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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R. Markley Dennis, Circuit Court Judge

Case No. 2021-CP-1005255

Teresa Melhado and Dane Neller . . . . . Appellants.

v.

City of Charleston, City of Charleston Board of Zoning Appeals, George Wallace, Erika Wallace, and Erika R. Hayes, Trustee of the Erika R. Hayes Revocable Trust u/a/d 8-4-2016, ... Respondents,

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REPLY TO RETURN TO PETITION TO CONFIRM AUTOMATIC STAY, OR IN THE ALTERNATIVE, FOR WRIT OF SUPERSEDEAS

Appellants make the following points in reply to the return filed by the Wallace Respondents:

1. Automatic Stay

Without seeking permission to argue against binding precedent and explicit instructions from our Supreme Court in *State v. Cooper*, 536 S.E. 2d 870, 342 S.C. 389, 398 (2000) (citing *Kearney v. Allen*, 287 S.C. 324, 338 S.E.2d 335, 337 (1985)), the Wallace Respondents nonetheless argue that the Circuit Court, instead of this Court, should determine whether an automatic stay

applies here.[1] (Ret. p. 25). Given this binding precedent, the Wallace Respondents' misguided argument must fail.

The Wallace Respondents then argue against an automatic stay, by citing basic principles of statutory construction, but not following the same. (Ret. p. 12). Plainly, expressly, and with clear and separate meaning, S.C. Code Ann. § 6-29-850 applies to this Court, making this Court's rules controlling, namely, the general automatic stay of Rule 241(a), SCACR; *whereas* S.C. Code Ann. § 6-29-830(B) applied to the Circuit Court. This Court is not the same as the Circuit Court.

2. Mootness and Alternative Relief

The Wallace Respondents do not address, and thus concede, the point that the Circuit Court *twice* erred as a matter of law in finding the issue of a stay to be moot – when to the contrary, the very purpose of a stay is to prevent the contested issue on appeal from becoming moot. *See* Rule 241(c)(2), SCACR; *Graham v. Graham*, 390 S.E.2d 469, 470, 301 S.C. 128, 130 (Ct. App. 1990); *Melton v. Walker*, 209 S.C. 330, 40 S.E.2d 161, 164 (1946). Notably, the Wallace Respondents prepared both of the Circuit Court's orders (Appx. p. 55, p. 79), which were adopted word-for-word, including the errant legal analysis that the issue of a stay was moot (as well as the curious analysis under federal case law and practice holding Appellants' motion for reconsideration unwarranted, when it was clearly required as a matter of appellate preservation, under our state case law and practice).

This unaddressed and conceded point, that the stay issue was never really moot, is why there are extraordinary circumstances, making Appellants' alternative petition for a writ of supersedeas appropriately directed to this Court under Rule 241(d)(1) – contrary to the Wallace Respondents' contention that Appellants should have asked for a stay from the unwilling Circuit

[1] The arguments presented by the Wallace Respondents on this and other issues throughout their return are not supported by binding authorities. Many of the inapposite opinions they cite are from the court of common pleas and other jurisdictions.

Court for a *third* time. (Ret. p. 26).

Remarkably, throughout their return, the Wallace Respondents do not refute, but instead make clear, that they are attempting to complete the project during the pendency of this appeal, so as to moot the contested issue of whether it should be constructed, which again, is the very purpose of a stay. *See* Rule 241(c)(2), SCACR; *Graham*, 390 S.E.2d at 470, 301 S.C. at 130; *Melton*, 209 S.C. 330, 40 S.E.2d at 164.

3. Status Quo

The Wallace Respondents do not address, and thus concede, the point that the status quo, *i.e.*, the thing to be preserved by a stay, *Graham*, 390 S.E.2d at 470, 301 S.C. at 130 and *Melton*, 209 S.C. 330, 40 S.E.2d at 164, is over two centuries old. The Wallace Respondents' lovely home on Church Street in downtown Charleston has stood since the 1800s, with Mr. Wallace admitting in the record below that they have happily resided there for the last 9 years, as self-described stewards of its history. (Appx. pp. 123-124). It must be emphasized that the Wallace Respondents, apparently no longer considering themselves to be stewards of history, are now trying to change the status quo of more than two centuries in a matter of a few months.

4. Prejudice

Mr. Wallace's newly submitted affidavit demonstrates only that he made a calculated decision and gamble, as an architect with 37 years of experience, to try to change the long-standing status quo, by beginning construction on the contested project during the pendency of these legal proceedings, at his own risk, knowing full well the consequences – if Appellants prevail, as they should, and if a stay is issued in the interim, as it should be. The Wallace Respondents cannot complain of prejudice resulting from their own calculated decision and gamble to get half way

through construction at this juncture.[2]

The only other ostensible form of prejudice that the Wallace Respondents complain about is the potential duration of these legal proceedings. (Ret. p. 19). Due process itself is not prejudice. By statute, Appellants had the right to appeal the Board's decision to the Circuit Court, per S.C. Code Ann. § 6-29-820, and they likewise have the right to appeal the Circuit Court's decision to this Court, per S.C. Code Ann. § 6-29-850. The Wallace Respondents knew this would be the process when they first set out to seek approval for a construction project, changing a two-century status quo, that substantially impacts Appellants, and violates the City's zoning ordinance, without the contested variance and special exception.

On the side of the Appellants, by contrast, there is real prejudice, which is not of their own doing. Ms. Melhado's affidavit of record (Appx. p. 22), *unopposed* below, and thus conceded by the Wallace Respondents when the Circuit Court twice denied a stay, explained the substantial impact on and prejudice to the Appellants. Responding now to the affidavit filed by the Wallace Respondents with their return, Ms. Melhado submits a second affidavit, filed herewith, refuting the newly made assertions by Mr. Wallace, and further demonstrating how Appellants have been detrimentally affected by Mr. Wallace's rush to complete construction, and how they would suffer irreparable prejudice if he is allowed to finish the construction before these legal proceedings are complete.

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[2] Appellants moved for a stay as soon as they saw construction beginning on the property. (Appx. p. 19, p. 22). The fact that the Wallace Respondents lined up permits in the preceding months means nothing, and certainly does not suggest delay by Appellants, as the Wallace Respondents argue. Appellants were sincerely shocked that the Wallace Respondents actually began construction during the pendency of this legal proceeding. Then, twice, the Wallace Respondents were able to put off the issue of whether there should be a stay, wrongly deeming it moot, in orders they prepared that were adopted by the Circuit Court. (Appx. p. 55, p. 79). And during this time, the Wallace Respondents did not oppose Ms. Melhado's affidavit in the record below. (Appx. p. 22). Instead, they were busy expediting completion of construction in hopes that this Court would ultimately shy away from preventing them from finishing the project.

5. Bond

The Wallace Respondents cite a case for the proposition that the party who seeks to lift an automatic stay should pay a bond, which works against them, as they are the parties that are effectively arguing to lift the automatic stay that applies here. (Ret. p. 23). In any event, imposing a bond on Appellants is not appropriate, as explained at the outset, given the Wallace Respondents' calculated decision and gamble to begin construction during the pendency of this appeal, at their own risk. If anyone is to post a bond, it should be the Wallace Respondents, in an amount sufficient to remove the new construction and restore the property its pre-construction state. It is the Wallace Respondents whose new construction and drastic change of the status quo that has existed for two centuries is irreparably prejudicing Appellants, as they detailed in Ms. Melhado's unopposed affidavit in the record below (Appx. p. 22), as well as her second affidavit responding to Mr. Wallace's newly submitted affidavit, filed herewith.

6. Meritorious Appeal

Last but not least, the Wallace Respondents insult, rather than address the issues raised by Appellants on the merits.[3] Among other characterizations that betray their legal position, they call Appellants' arguments "ridiculousness" (Ret. p. 17), while they repeatedly call their own construction project "small." (Ret. *passim*). They also ask the Court to make a surface comparison of the brevity of Appellants' 4-page petition versus the heft of their 27-page return. (Ret. pp. 11, 16). But given that this is an appeal of the Circuit Court acting in an appellate capacity, the 210-page appendix, filed with and incorporated by reference in the petition itself, contains Appellants'

[3] The Wallace Respondents do not provide any binding authority for the proposition they advance that this Court is required to decide who is likely to prevail on the merits before it can issue a stay (Ret. p. 11), again citing inapposite opinions from the court of common pleas and other jurisdictions, while ignoring that the relevant binding authorities, cited by Appellants, do not set forth such a standard, including the rule itself, Rule 241(c)(2), SCACR, as well as applicable reported cases, *Graham*, 390 S.E.2d at 470, 301 S.C. at 130, and *Melton*, 209 S.C. 330, 40 S.E.2d at 164. Notwithstanding, Appellants have established that they are likely to prevail on the merits.

arguments on the merits, in full detail. The motion for reconsideration, in particular, explains exactly what the Circuit Court got wrong, as a matter of law, in its order, and it incorporates by reference the arguments set forth in its prior briefs (initial, supplemental, and reply) that the Court Circuit failed to address, which in combination, constitute the arguments preserved for this Court's review, as explained in Appellant's 4-page petition, presenting the issue of whether there should be a stay as succinctly as possible, by summarizing the meritorious appeal and directing the Court to the briefs in the appendix for further detail. (Appx. p. 66 (reconsideration motion), p. 3 (initial brief), p. 28 (supplemental brief), p. 53 (reply brief)); (Pet. p. 3 ("Appellants will be meritorious in this appeal based on the issues raised in their briefs and preserved in their reconsideration motion below, which will be fully set forth in their opening brief and argued to this Court in accordance with the South Carolina Appellate Court Rules."), p. 4 n. 1 ("Among other issues . . . [summarizing the issue regarding the defective hearing]")). The notion the Wallace Respondents advance that Appellants did not argue the merits in their petition is no more than a form-over-substance criticism that Appellants did not cut and paste text that they incorporated by reference and provided in the appendix filed with their petition. The 27-page return filed by the Wallace Respondents is just that, a cut and paste exercise.

The appellate issue receiving the most attention from the Wallace Respondents in their return, moreover, is again not taken on, squarely or fairly. As in the initial order proposed by the Wallace Respondents and adopted by the Circuit Court (Appx. p. 55), and as complained of in Appellants' disregarded motion for reconsideration to the Circuit Court (Appx. p. 66), the Wallace Respondents present strawman arguments in their return to the instant petition, which are easy to knock down, but are not actually the arguments made by Appellants. Specifically, Appellants do not, as inaccurately presented by the Wallace Respondents, advance a generalized challenge to the ubiquitous use of Zoom and other technologies to conduct hearings; nor do they argue for trial-

type cross-examination; nor do they take issue with reasonable time limitations at public hearings. (Ret. pp. 9, 10, 16, 17).

Rather, Appellants have a particularized grievance that they were deprived of a specific and fundamental right, provided for in the City's ordinance and a South Carolina statute, and duly protected as a constitutional matter, to object to new, unsubstantiated, improper, false, and misleading testimony and evidence offered by the Wallace Respondents during their reply, and later in a question and answer session with the Board, while Appellants were technologically disabled and gagged from lobbing their procedurally and statutorily protected objections and correcting the confusion that manifested among the members of the Board. (Appx. pp. 74, 135-144).

More particularly, City of Charleston Ordinance, Appendix C, Article IV, Section 3, provides: "The chairman will *rule on all evidentiary matters*. Evidence may be placed in the record with an *objection noted*.") (emphasis added). And the Board is statutorily bound to adopt procedures in compliance with this ordinance, allowing for objections to be raised and ruled upon during the hearing and noted in the record, pursuant to S.C. Code Ann. § 6-29-790, which provides: "The board shall adopt rules of procedure in accordance with the provisions of an ordinance adopted pursuant to this chapter." The Board's so-called "Zoom Meeting Protocol" (Appx. p. 83) whereby it disabled and technologically gagged Appellants, prohibiting Appellants from making any objection or taking any other action, is therefore not only noncompliant with the ordinance, but also with the statute, as well as constitutional principles of due process. *See Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) ("The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'"); *Stono River Environmental Protection Ass'n v. South Carolina Dept. of Health and Environmental Control*, 406 S.E.2d 340, 342, 305 S.C. 90 (1990) ("[T]he parties were entitled to notice and the

opportunity to be heard."); S.C. Const., art. I, § 3; U.S. Const. amend XIV.

And more particularly as to what evidence was presented and how the Board was confused, while Appellants were technologically gagged during the Wallace Respondents' reply, and later in a question and answer session with the Board (Appx. pp. 135-144):

- Appellants' land and house, including their bedroom, windows, porches, and the parapet wall, are not situated and configured as the Wallace Respondents described, and they omitted that Appellants' L-shaped property includes a house to the rear of the Wallace Respondents' property, with five windows facing the proposed project, in addition to the house on the side that they inaccurately described.
- The impact to Appellants' view, light, and air, each an element the Board must consider, would be tremendous, not miniscule, as the Wallace Respondents concluded, with 100% blockage, not 27 degrees of blockage, as the Wallace Respondents self-servingly professed to have measured, without even having the ability to go on the Appellants' property to perform such measurements.
- The Wallace Respondents also understated the amount of noise that would emanate from the generator in the rear and multiple HVAC compressors to be located just outside Appellants' bedroom window, and they possessed no expertise to opine on that noise issue, anyhow. *See Wyndham Enterprises, LLC v. The City of North Augusta*, 401 S.C. 144, 151, 735 S.E.2d 659, 663 (Ct. App. 2012) (holding that a board's decision must be "supported by competent, substantial, and material evidence" and cannot be based on "opinion and speculation").
- And when asked by a confused Board member whether the property owner to the rear supported the project, the Wallace Respondents did not forthrightly answer, as they should have, by stating something along the lines of: *no, you are confused, the*

property to the rear is Appellants' and they strongly oppose this application.

(Appx. pp. 135-144).

Appellants, meanwhile, were silenced in front of a computer screen unable to activate their disabled camera and microphone, desperate to dispel all of the confusion, correct the record, and seek the chairman's ruling on these crucial evidentiary matters, as Appellants were entitled to do, under City of Charleston Ordinance, Appendix C, Article IV, Section 3, S.C. Code Ann. § 6-29-790, S.C. Const., art. I, § 3, and the U.S. Const. amend XIV.

The Wallace Respondents avoid addressing this argument in their return, in its particulars, because there is no way to defeat it. They similarly avoided addressing it in the orders they proposed to the Circuit Court, for the same reason. (Appx. p. 55, p. 79). And the Circuit Court chose not to add any analysis of it before adopting the proposed orders, leaving it for this Court to consider as a matter of first impression. (Appx. p. 55, p. 79). Indeed, it is an important issue for this to Court rule upon and create a precedent to be followed by various boards and bodies across the state, which are testing and perfecting the use of new technological functionalities and protocols in virtual hearings.

The Wallace Respondents cannot forever hide behind the deferential legal standard that applies in zoning appeals regarding the Board's view of the evidence. This is not a typical zoning appeal. The evidence was tainted. The public hearing was not properly conducted. The Board made a fundamental, prejudicial mistake, technologically gagging Appellants from objecting and dispelling the confusion among the Board about their property and how it would be impacted, which clearly mandates a rehearing. The evidence needs to be fixed. And the Board needs to consider it anew, in a properly conducted public hearing (which certainly could be virtual, to be

sure Appellants' argument is not misunderstood).[5] For this central reason, and many others, detailed in Appellants' disregarded motion for reconsideration that preserved these issues for this Court's review (Appx. p. 66), the Board's decision should not have been affirmed by the Circuit Court, as a matter of law.

WHEREFORE, respectfully, this Court should confirm the existence of an automatic stay, or alternatively, grant a supersedeas staying all matters affected by this appeal.

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Charleston, South Carolina
July 29, 2022

[5] The Wallace Respondents speciously argue that the Board already gave Appellants a second hearing. (Ret. pp. 2, 18). To clarify, the Board only held one hearing on the Wallace Respondents' application. The Board subsequently declined to grant an appeal for reconsideration seeking a rehearing, which if granted, would have been a real second hearing, at which the evidence would have been fixed and the Board would have had to consider it anew. *See* City of Charleston Ordinance, Appendix C, Section 3 ("An appeal for reconsideration of a decision of the Board must be filed within five (5) business days from the date of the Board's decision, order, requirement or determination by delivery of the approved appeal form and fee to the Zoning Division office. To grant the appeal for reconsideration, the Board must find that it misapprehended or misconceived the question or questions involved, or that it erred in its finding or disposition of the appeal, application or matter. *If such appeal is granted by the Board, the decision shall be withdrawn and the matter heard and considered de novo, as if no hearing, consideration or determination had been previously made or heard.*") (emphasis added).

VERIFICATION

Teresa Melhado and Dane Neller, being duly sworn, verify that they are the Petitioners herein, and have read the foregoing Reply to the Return to the Petition to Confirm Automatic Stay, or in the Alternative, for Writ of Supersedeas, and know the contents thereof, and that the same is true to their own knowledge.

SWORN and Subscribed before me)
)
this 29 day of July, 2022)
)
Notary Public For New York)
)
My Commission Expires: 04/12/2025)

Teresa Melhado
Signature of Petitioner

Dane Neller
Signature of Petitioner

KEVIN RODRIGUEZ OSORIO
NOTARY PUBLIC, STATE OF NEW YORK
NO.01RO6416209
QUALIFIED IN SUFFOLK COUNTY
TERM EXPIRES APRIL 12, 2025

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R. Markley Dennis, Circuit Court Judge

Case No. 2021-CP-1005255

Teresa Melhado and Dane Neller . . . . . Appellants.

v.

City of Charleston, City of Charleston Board of Zoning Appeals, George Wallace, Erika Wallace, and Erika R. Hayes, Trustee of the Erika R. Hayes Revocable Trust u/a/d 8-4-2016, ... Respondents,

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SECOND AFFIDAVIT OF TERESA MELHADO MADE IN SUPPORT OF REPLY TO RETURN TO PETITION TO CONFIRM AUTOMATIC STAY, OR IN THE ALTERNATIVE, FOR WRIT OF SUPERSEDEAS

I, Teresa Melhado, being duly sworn, hereby state and affirm, as follows:

1. This is my second affidavit in this matter.

2. My first affidavit, dated March 16, 2022, was filed with the Circuit Court, where it was unopposed by the Wallace Respondents, and a true and correct copy of the same is provided in the appendix filed with the instant petition.

3. I am making this affidavit in reply to certain assertions made in the affidavit filed with this Court by George Wallace on July 25, 2022.

4. The pictures attached hereto as Exhibits A and B show the current state of the contested construction, as of July 28, 2022, from the vantagepoint of two of my bedroom windows,

demonstrating the substantial impact on our view, light, and air, both to our bedroom and balcony on the side of the construction and to the separate house on our property just behind the construction, contrary to affirmations made by Mr. Wallace.

5. Addressing other matters raised by Mr. Wallace, we, being my husband, Dane Neller, and I, initially found out that the Wallaces were petitioning to do some construction when our contractor told us that he had bumped into someone who told him that they were proposing to add a dormer to the front of their house.

6. The Wallaces emailed me and told me of their plans to build a "garden room and some closets." As described, their proposed addition sounded like a minor enhancement. The Wallaces did not notify us in advance that there was a BZA meeting scheduled to rule on whether they would be entitled to a variance and exception to the setback laws until we met with them at our house on the day before the meeting.

7. We were not aware of the proposed scope of the Wallace's substantial addition until we met them and they stood with us on our bedroom second floor porch and described it to us. Mr. Wallace did a mock-up of the proposed obstruction to our view and we were shocked. As it turns out, his mock-up did not even accurately portray the extent of the potential blockage of our view to the north. The view is 100% blocked. And their "garden room and closet area" reach a height equivalent to a three-story building (although it is apparently two, high ceilinged, stories).

8. We realized that our enjoyment of our property, as well as its market value, would be substantially diminished by the Wallaces' proposed addition. The character and beauty of our historical district would also be impaired. Their addition would jut out and block our view and neighbors' views of a continuous flow of backyard gardens that have existed for hundreds of years. We wrote a letter objecting to their proposed addition.

9. Although the Wallaces obtained a supporting letter from their neighbor to the north (who was planning to install a backyard pool and may have needed the Wallace's approval and support for their project), they did not receive supporting letters from any other nearby or contiguous neighbors. They only received supporting letters from people who were not in the sight line of their house and, in many cases, lived blocks away. In our conversations with nearby neighbors, not a single one has been aware that the Wallaces were planning to build an immense structure that totally filled their backyard and obstructed neighborhood views.

10. Our property is to the south of the Wallace's property and wraps around and is also on the east of their property. We are thus the neighbors to the south and east. When asked by the BZA whether the neighbors to the east objected to the planned structure, Mr. Wallace did not explain that *WE* were the neighbors to the east. He also inaccurately stated that our view was going to be impacted slightly by their addition, bizarrely stating that our view would only be diminished by "27 degrees." Our previously lovely view of gardens to the north is, in fact, 100% blocked. We were not given a mechanism for objecting to Wallace's lies at the BZA hearing.

11. The Wallaces have decided to proceed with construction of their massive addition, creating nuisances, damaging the value and irreparably harming the enjoyment of our property, despite our appealing the decision, among other grounds, on the basis of our due process rights being violated by the way the meeting was conducted.

12. It is beneath the dignity of this Court for the Wallace Respondents to request of it a continuation of their construction because Mr. Wallace thinks we are northerners who spend most of their time in another state. We are property owners who are harmed by the Wallaces' actions and have been deprived of due process. It is irrelevant where we are from and how we spend our time. For the record, however, we are in the process of becoming South Carolina residents.

Further affiant sayeth not.

Teresa Melhado

SWORN to before me this
29th day of July in 2022

Notary Public for: New York
My Commission Expires: 04/12/2025

KEVIN RODRIGUEZ OSORIO
NOTARY PUBLIC, STATE OF NEW YORK
NO.01RO6416209
QUALIFIED IN SUFFOLK COUNTY
TERM EXPIRES APRIL 12, 2025

Exhibit A


DUPONT
Tyvek
HomeWrap
DUPONT
Tyvek
HomeWrap
Text
DUPONT
Tyvek
HomeWrap
Text

Exhibit B

PROOF OF SERVICE

I, Jason S. Smith, certify that the foregoing Reply to the Return to the Petition to Confirm Automatic Stay, or In The Alternative, For Supersedeas was served on the following counsel of record by e-mail on this day, July 29, 2022:

/s/ Jason S. Smith

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